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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re ACACIA MEDIA TECHNOLOGIES CORPORATION	Case No. 05 CV 01114 JW MDL No. 1665 **PLAINTIFF ACACIA MEDIA TECHNOLOGIES CORPORATION'S OPPOSITION TO ECHOSTAR'S MOTION TO AMEND SCHEDULING ORDER** **[LOCAL RULE 6-3]** Date: N/A Time: N/A Ctrm: 8, 4th Floor Judge: Honorable James Ware

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I. INTRODUCTION

Acacia opposes EchoStar's Motion to Amend the Court's February 27, 2006 Scheduling Order regarding claim construction which was previously agreed to by all parties. The Court should not postpone all briefing and hearings on the claim construction issues for the '863 and '702 patents as Defendants request. Defendants' motion is interposed for delay and the requested relief does not promote judiciary economy.

II. THE AGREED UPON SCHEDULE PROMOTES JUDICIAL ECONOMY, AVOIDS UNNECESSARY DELAY, AND SHOULD NOT BE AMENDED

EchoStar's motion has it backwards – the Court should follow the stipulated schedule for construing the '863 and '720 patent terms *because* the '863 and '720 patent claim terms at issue are identical to, similar to, and/or related to claim terms in the '992 and '275 patents. The Court can issue a single claim construction order after all of the briefing and hearings have been concluded on all of the terms at issue.

Good cause does *not* exist for modifying the Court's February 27 scheduling order. All of the parties agreed to, and the Court adopted, this schedule at the February 24, 2006 Case Management Conference. Following the Court's entry of the scheduling order, there has been *no* material fact change that would give the Court any reason to postpone the briefing or the hearing on the claim terms from the '863 and '720 patents. The same claim terms in the '992 and '275 patents, which EchoStar contends are identical to, similar to, and/or related to the claim terms of the '863 and '720 patents, at issue on February 24 at our Case Management Conference are still at issue today.

The only change from February 24 to today is the fact that Acacia withdrew claims 47, 48, 49, 51, 52, and 53 of the '992 patent from the subject matter of this case. This was done by Acacia simply to streamline this case and to reduce the claim construction burden on this Court. At trial and following discovery, Acacia intends to select representative claims from each patent to prove infringement against each defendant. By withdrawing claims 47-53 of the '992 patent now, which claims contain multiple means-plus-function elements, Acacia simply began that winnowing process which had nothing to do with the Defendants' claim construction contentions concerning those claims. To the extent Defendants' motion is based on the factual premise that Acacia abandons claims as a result of Defendants' claim construction briefing, it is a false premise.

Acacia agrees with Defendants' observations that the Court's construction of the terms in the '992 and '275 patents will likely inform the construction of similar identical terms in the '863 and '720 patents. It does not follow from that observation, however, that the Scheduling Order should be amended. Just the opposite is true.

This Court should retain the current briefing and hearing schedule and issue a single, final Markman ruling at the conclusion of all the hearings. To the extent claim terms are identical or similar between the '992, '275, '863 and '720 patents, this Court should issue a single Markman ruling harmonizing those constructions. Acacia's decision reduced the number of claim terms at issue for the June 14-15 hearing from 49 terms to 35 terms. Postponing the briefing and hearing on the '863 and '720 patents as Defendants suggest condemns this Court and all parties to multiple hearings on the exact same claim terms. The Court construed the terms "items" and "sequence of addressable data blocks" in Markman I. The Round 3 defendants, seeking reconsideration of the construction of those terms, are now scheduled to brief and argue these terms at the August 11 hearing. The '863 and '720 patents include those identical terms, and the current schedule assures they will be addressed on August 11, 2006. Echostar's request in this motion, if granted, would require the Court to consider these terms at the August 11 hearing in the context of the Round 3 defendants' request for reconsideration and thereafter consider these same terms again at the defendants' proposed re-scheduled hearing on the '863 and '720 patent terms.[1]

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[1] The Rounds 1 and 2 defendants should not even be permitted to re-argue the Court's construction of "sequence of addressable data blocks" or the term "addressable" contained in this phrase. The Court construed this phrase in Markman I and no party (including any of the Rounds 1 and 2 defendants) sought reconsideration of this phrase as part of Markman II. The Rounds 1 and 2 defendants therefore waived their right to seek reconsideration of this phrase or any portion of this phrase now.

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III. ACACIA DISAGREES WITH ECHOSTAR'S CLAIM CONSTRUCTION CONTENTIONS MADE IN ITS MOTION TO AMEND THE SCHEDULING ORDER

EchoStar uses its motion to amend the scheduling order as a vehicle to argue certain of its claim construction contentions, with which Acacia disagrees. For example, EchoStar contends that the fact that it has argued that the term "receiving system" used in the claims of the '992 and '275 patents is indefinite means that the terms similar to (but not identical to) "receiving system" that are used in claims of the '863 and '720 patents are likewise indefinite. These terms are not indefinite. Notably, only the Rounds 1 and 2 defendants contend that the term "receiving system" is indefinite. The Round 3 defendants do *not* contend that this term is indefinite; rather, they provided a construction for this term. Further, the Court has already *construed* the term "reception system" in Markman II. No party sought reconsideration of the Court's construction for "reception system," meaning that neither the Rounds 1 and 2 defendants nor the Court had any difficulty understanding the meaning of "reception system," which is a term nearly identical to "receiving system."

IV. CONCLUSION

For the foregoing reasons, Acacia respectfully requests that the Court deny EchoStar's motion and not issue any additional rulings on the construction of any claim term until after the parties have fully briefed and argued the constructions for the terms from the '992, '275, '863, and '720 patents.

DATED: June 2, 2006

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PROOF OF SERVICE-UNITED STATES DISTRICT COURT

STATE OF CALIFORNIA,)
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I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 601 South Figueroa Street, Suite 3300, Los Angeles, California 90017.

On June 2, 2006, I served a copy of the within document described as **PLAINTIFF ACACIA MEDIA TECHNOLOGIES CORPORATION'S OPPOSITION TO ECHOSTAR'S MOTION TO AMEND SCHEDULING ORDER** by transmitting via United States District Court for the Central District of California Electronic Case Filing Program the document listed above by uploading the electronic files for each of the above listed document on this date, addressed as set forth on the attached Service List.

The above-described document was also transmitted to the parties indicated below, by Federal Express only.

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I am readily familiar with Hennigan, Bennett & Dorman LLP's practice in its Los Angeles office for the collection and processing of federal express with Federal Express.

Executed on June 2, 2006, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/S/ Carol Yuson
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